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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, AND CHICAGO MILWAUKEE CORPORATION,
Petitioners,

vs.

RICHARD B. OGILVIE, AS TRUSTEE OF THE PROPERTY OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, THE UNITED STATES OF AMERICA, AND HARRIS TRUST AND SAVINGS BANK,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Is the question of the validity of Sections 7 and 22 of the Milwaukee Railroad Restructuring Act[1] (the MRRA) under article I, section 8, clause 4 of the Constitution of the United States ripe for review?

2. Do Sections 7 and 22 of the MRRA, which require that one specifically named bankrupted railroad continue to operate concededly unreorganizable rail lines and which impose the cost of such operations on the bankrupted railroad's shareholders through forced loans from the United States, violate the uniformity requirement of article I, section 8, clause 4 of the Constitution of the United States?

3. Do Sections 7 and 22 of the MRRA violate the Just Compensation clause, the Due Process clause, and the Equal Protection Provisions of the Fifth Amendment of the Constitution of the United States by requiring the continued operations of the Debtor's entire system at the expense of its shareholders?

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[1] MRRA §§ 7 & 22, 45 U.S.C. §§ 906 & 920 (Supp. IV 1980).

LIST OF PARTIES*

The parties before the United States Court of Appeals for the Seventh Circuit were: Chicago, Milwaukee, St. Paul and Pacific Railroad Company (the Debtor) and Chicago Milwaukee Corporation (CMC), as Appellants; and Richard B. Ogilvie, as Trustee of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company (the Trustee); the United States of America; and Harris Trust and Savings Bank, as Appellees.

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* Pursuant to Rule 28.1 of the Rules of this Court, petitioner CMC reports that it is a parent company and that its only subsidiary (except wholly owned subsidaries) or affiliate is Chicago, Milwaukee, St. Paul and Pacific Railroad Company. The following is a list of companies which are not wholly-owned subsidiaries of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, but which may be deemed affiliates:

Chicago Union Station Company,
Chicago, Terra Haute & S.E. Ry. Co.,
Davenport, Rock Island & N.W. Ry. Co.,
Indiana Harbor Belt R.R. Co.,
Kansas City Terminal Ry. Co.,
The Minnesota Transfer Ry. Co.,
Trailer Train Company, and
National Railroad Passenger Corporation

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Chicago, Milwaukee, St. Paul and Pacific Railroad Company[2] (the Debtor) and Chicago Milwaukee Corporation (CMC) pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit which declined to pass upon the constitutionality of Sections 7 and 22 of the Milwaukee Railroad Restructuring Act, 45 U.S.C. §§ 906 & 920 (Supp. IV 1980) (the MRRA).

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[2] The term "Milwaukee Road" is used here to describe the railroad operating system as distinguished from the "Debtor" in its corporate capacity and the "Estate" as the fiscal entity created upon the filing of a Section 77 petition for reorganization.

OPINIONS BELOW

The Memorandum decisions and orders of the Reoganization Court[3] are unreported, but appear as Appendices B and C. App. A-4-A-17. The decision of the United States Court of Appeals for the Seventh Circuit, as to which certiorari is sought, is reported at 701 F.2d 604 and appears as Appendix D. App, A-18-A-32. The orders of the Court of Appeals (a) allowing the filing of the Petition for Rehearing *En Banc* Instanter, and (b) denying the Petition for Rehearing *En Banc* are unreported but appear as Appendices E and F. App. A-33-A-35.

JURISDICTION

The Court of Appeals' decision was rendered on 16 February 1983. 701 F.2d 604, *infra* at App. A-18. A Petition for Rehearing *En Banc* was filed on 3 March 1983 by leave of Court and denied on 21 April 1983. App. A-33-A-35. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves article I, section 8, clause 4 of, and the Fifth Amendment to, the Constitution of the United States. It also involves 45 U.S.C. § 901 *et seq*. The relevant constitutional and statutory provisions are set forth as Appendix A. App. A-1-A-3.

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[3] The United States District Court for the Northern District of Illinois, Eastern Division, The Honorable Thomas R. McMillen presiding in No. 77 B 8999.

STATEMENT OF THE CASE

This case involves a consolidated appeal[4] from two orders of the Reorganization Court, App. A-4-A-17, upholding the constitutionality of Sections 7 and 22 of the MRRA and approving the issuance of up to $60 million in trustee's certificates of indebtedness to finance the deficit operation of the entire Milwaukee Road system during a congressionally mandated period.

The Debtor is a Wisconsin railroad corporation organized in 1847. During the intervening 136 years, it has been in receivership or reorganization on two prior occasions—from 1925 to 1928 and from 1935 to 1945. *Group of Institutional Investors v. Chicago, Milwaukee, St. P. & Pac. R. Co.*, 318 U.S. 523 (1943). It filed its third petition for protection from its creditors on 19 December 1977 pursuant to Section 77.[5] At that time, the Milwaukee Road was a Class I transcontinental railroad operating over some 10,000 route miles in the Midwest and across the northern tier of states from Chicago to the Pacific Northwest.

In the three years preceding the filing of the reorganization petition, the Debtor lost approximately $105 million. During the approximately 22 months of reorganization, ending October 1979, which immediately preceded the events underlying this petition, the Estate suffered reorganization operating losses in excess of $175 million. By the end of February 1980, these reorganization losses grew to $238 million.[6]

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[4] Nos. 79-2444 and 80-1425 (7th Cir.).

[5] Chapter VIII of the Bankruptcy Act of 1898, as amended, 11 U.S.C. § 205 (*repealed effective* 1979). These proceedings continue to be governed by Section 77. Act of Nov. 6, 1978, Pub. L. No. 95-598, §§401-403, 92 Stat. 2549, 2683 (1978).

[6] The Estate has suffered total reorganization operating losses of $413.6 million during the years 1978-1982, inclusive.

As a result of these deficit operations, in April 1979, the Trustee petitioned the Reorganization Court for permission to embargo all lines outside a 3,900 mile midwest "Core" system which he had identified as having the best potential for successful reorganization. On 1 June 1979, the Reorganization Court denied the Trustee's request but, on appeal, the Court of Appeals for the Seventh Circuit reversed. *In re Chicago, Milwaukee, St. P. & Pac. R. Co.*, 611 F.2d 662, 668-70 (7th Cir. 1979).

In August 1979, the Trustee filed a Plan of Reorganization and again sought to embargo all lines outside the Core. On 27 September 1979, the Reorganization Court granted this embargo request, effective 1 November 1979. During the course of the hearings before the Reorganization Court, virtually all the principal parties, including the United States, conceded that the entire Milwaukee system was not reorganizable.[7] The embargo of the non-Core lines went into effect 1 November 1979 but service was interrupted for only a few days.

On 4 November 1979, the Congress intervened directly by enacting the MRRA. Section 22 required the Trustee to maintain service over the entire Milwaukee system at the level existing on 15 October 1979. MRRA § 22(a), 45 U.S.C. § 920 (a), *infra* App. A-3. Further, it precluded any embargo, abandonment, or discontinuation of service until the occurrence of one of several trigger events. MRRA § 22(b), 45 U.S.C. § 920(b), *infra* App. A-3. Congress also prohibited the use of "directed service" under 49 U.S.C. § 11125 on any of the Milwaukee Road's lines until 1 April 1981. MRRA § 18, 45 U.S.C.

[7] This view was not held by the parties representing the Milwaukee Road's employees, the interests of the states outside and those representing the Core system. While the United States conceded that the entire system was not reorganizable, it opposed the requested embargo.

§ 916, *infra* App. A-3. To provide funds to operate the entire Milwaukee system during this period, Section 7 directed the Secretary of Transportation to grant the Estate $10 million and to guarantee the Trustee's certificates of indebtedness in an amount equal to the difference between the Estate's total expenses in providing entire system services, as required by Section 22, and its revenues during the period of such operation. MRRA § 7, 45 U.S.C. § 906, *infra* App. A-1-A-2. These certificates were granted a statutory priority junior to all creditors, *but senior to the Debtor's equity holders.* MRRA § 7(f), 45 U.S.C. § 906(c), *infra* App. A-2.

With the passage of the MRRA, the Trustee sought authority to continue system-wide operations and to borrow $30 million pursuant to its provisions. On 23 November 1979, the Reorganization Court granted the Trustee's request for authority to borrow pursuant to the MRRA or, alternatively, pursuant to the Emergency Rail Service Act of 1970, 45 U.S.C. § 661 *et seq.*, *infra* App. A-16-A-17. Ultimately, funds were made available to the Trustee under the MRRA. After the occurrence of the Section 22(b)(2) trigger event on 31 December 1980, the Trustee requested authority to borrow an additional $45 million under the MRRA to finance the continued system-wide operation of the Milwaukee Road for an additional 60 days. On 25 February 1980, he was authorized to borrow up to an additional $30 million. App. A-17. As a result of Orders 246 and 246-C, App. A-4-A-17, the Trustee was authorized to issue $60 million in MRRA guaranteed trustee's certificates having a priority junior to creditors, but senior to the common and preferred shareholders, in order to finance the system-wide operation of the Milwaukee during the period 1 November 1979 through 29 February 1980.

Pursuant to the authority granted to him by the Reorganization Court, the Trustee issued certificates of indebtedness totaling approximately $55 million. The Secretary of Transportation guaranteed those certificates pursuant to the mandate of Section 7(e). The Federal Financing Bank advanced funds against the certificates. When the Trustee defaulted, the Secretary honored his guarantee and succeeded to the interest of the Federal Financing Bank. The MRRA debt is accruing interest at a compound rate of 14.687 percent and will approximate $104 million by 31 December 1984, the target date for consummating the Trustee's Amended Plan of Reorganization.

In October 1980, Congress amended the MRRA. Section 701 (c)(1) of the Staggers Rail Act of 1980, 45 U.S.C. § 906(e) (Supp. IV 1980), provides that the Estate's MRRA indebtedness will be forgiven if the Debtor is reorganized as an operating rail carrier, or if substantially all of its rail assets are purchased for continued rail use and 50 percent or more of its employees are retained in railroad employment. *Id.*, *infra* App. A-3.

On 17 August 1982, the Trustee executed a Stock Acquisition Agreement with Grand Trunk Corporation[8] (GTC). Pursuant to this agreement, GTC will gain control of the Estate's remaining operating rail assets (the Core System), subject to certain liabilities not to exceed $255 million. The Trustee projects that the assets have the ability to produce pre-tax net income after the service of debt and that they have a liquidation value of $320.2 million. The reorganized Debtor, which

[8] GTC is a Delaware corporation which is a wholly-owned subsidiary of Canadian National Railway Company, a Canadian Crown corporation, all of whose capital stock is owned by Her Majesty the Queen in right of Canada.

will own these assets, will have $104 million in common shareholder's equity. The Estate receives no direct compensation from this transaction. Rather, the Trustee points to the Staggers Act's conditional forgiveness as one of the major benefits justifying the transaction. Thus, the existence of the MRRA debt is eroding the Estate at a compound rate of 14.687 percent per annum, and it is directly influencing the Trustee's actions.

On 16 February 1983, the United States Court of Appeals dismissed Petitioners' appeals from Orders 246 and 246-C. 701 F.2d 604, *infra* App. A-18. The Court concluded that, "because important facts will not be known until there are further proceedings below, the action is not ripe for review." 701 F.2d at 605, *infra* App. A-19. The Court of Appeals identified two primary unknown facts: (1) the possibility that the Estate is, or will become, insolvent, and (2) the possibility of a Staggers Act forgiveness of the MRRA debt. 701 F.2d at 607-608, *infra* App. A-25-A-26. In reaching its conclusion that the appeals were not ripe for decision, the Court of Appeals states that it followed this Court's reasoning in *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974) (*3-R Cases*). 701 F.2d at 609, *infra* App. A-28.

Petitioners' Petition for Rehearing *En Banc* was denied on 21 April 1983. App. A-34, A-35.

STAGES AT WHICH THE FEDERAL QUESTIONS WERE RAISED AND PRESERVED

Petitioners raised and argued the issues relating to the constitutionality of Sections 7 and 22 of the MRRA before the Reorganization Court and the Court of Appeals. *See, e.g.*, App. A-4-A-17. The Reorganization Court passed upon the merits of

the issues, but the Court of Appeals refused to reach the merits. App. A-7-A-17; A-18-A-32.

BASIS FOR FEDERAL JURISDICTION

The basis for federal jurisdiction in the Reorganization Court is 11 U.S.C. § 205 (1976) (*repealed effective* 1979) which continues to govern the proceedings. Act of November 6, 1978, Pub. L. No. 95-598, §§ 401 & 403, 92 Stat. 2549, 2682-3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

REASONS FOR GRANTING THE WRIT

A. Impact of Decision Below and Reasons for Granting Writ.

We submit that the implications of the MRRA threaten the survival of the effectiveness of the limitations on congressional power contained in the Bankruptcy Clause. This Court's decision in *Railroad Labor Executives Ass'n v. Gibbons*, 455 U.S. 457 (1982), made clear that this limitation is fundamental to a proper congressional exercise of the bankruptcy power. The Court of Appeals' refusal to reach the merits of these appeals threatens to permit Congress to interfere in the reorganization process on a selective basis and to avoid *Gibbons* by conditionally postponing the adverse impact of its enactment or by conditionally mitigating that impact. Such a result effectively reads the uniformity limitation out of the Constitution. *Id.* at 473.

The factual and legislative context of this case is virtually identical to that present in *Gibbons*. Here, as in *Gibbons*, Congress reached into a pending bankruptcy proceeding to redirect its course by means of legislation applicable to only one,

specifically named, bankrupted railroad. Faced with both judicial and executive analyses which concluded that the entire Milwaukee Road system could not be reorganized, Congress ordered the continued operation of the entire system.[9] To impose such an obligation upon a single, specifically named, bankrupted railroad during the pendency of a reorganization proceeding, is manifestly a law on the subject of bankruptcy which violates the uniformity requirement of article I, section 8, clause 4 of the Constitution of the United States (the Bankruptcy Clause). *Gibbons*, 455 U.S. at 473.

The burden of this congressional abuse of its bankruptcy power falls, by congressional decree, only upon the Debtor's shareholders. The MRRA is a congressional attempt to advance a tailor-make reorganization plan. As such, it transgresses the limits of bankruptcy relief permissible under the Bankruptcy Clause. The two most recent congressional efforts[10] to reorganize railroads by legislation have injected a serious element of uncertainty into the administration of the bankruptcy laws, into the relationship between debtors

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[9] The continued loss operation of unreorganizable rail lines violates the Fifth Amendment. *Brooks-Scanlon Co. v. Railroad Commission*, 251 U.S. 396 (1920) (and its progeny). Thus, even if the MRRA is a valid bankruptcy law, it violates the Just Compensation, Due Process and Equal Protection clauses of the Fifth Amendment.

[10] Rock Island Railroad Transition and Employee Assistance Act, 45 U.S.C. §§ 1001 *et seq.* (Supp. IV 1980) and Milwaukee Railroad Restructuring Act, 45 U.S.C. §§ 901 *et seq.* (Supp. IV 1980), each involve only a single bankrupted railroad both of which were operating in the same geographic areas and subject to reorganization in the same judicial district, while the Regional Rail Reorganization Act of 1973, 45 U.S.C. §§ 701 *et seq.* (1976) involved all the brankrupted railroads in a defined geographic area which, it turned out, were all the bankrupted railroads operating in the United States. *3-R Cases*, 419 U.S. at 160.

and their creditors, shareholders, and trustees, and into the formulation of reorganization plans involving politically sensitive industries. These circumstances underlie the reasons why this Petition should be granted.[11]

The Court of Appeals' refusal to reach the constitutional merits in this case is tantamount to a decision that the challenged sections are constitutional. The decision undermines the orderly progress of this reorganization proceeding by leaving open constitutional questions of fundamental importance to all of the parties and to the administrative and judicial bodies involved. The Trustee's Amended Plan demonstrates that he is proceeding upon the assumption that the MRRA debt is constitutionally valid. The Interstate Commerce Commission is being asked to judge the fairness and equity of a reorganization plan which is premised upon obtaining the forgiveness of the $104 million congressionally imposed MRRA liability. The Reorganization Court is being asked to evaluate the propriety of the transfer of control of the Core system to GTC—a proposal advanced by the Trustee in order to trigger the Staggers Act forgiveness of the MRRA debt. Creditors are being paid, property sold, and a complex financial and corporate restructuring advanced, all upon the assumption that one of the largest pending obligations has a valid constitutional basis. It will be too late to make that determination, as

[11] Given Congress' repeated enactment of special railroad bankruptcy legislation, it is not speculation to conclude that Congress is willing to continue to intervene in this troubled industry. Such a possibility, in itself, requires reaching the merits here. *See, Southern Pacific Terminal Co. v. I.C.C.*, 219 U.S. 498, 515 (1911); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953); *Carroll v. President & Comm'ers of Princess Anne*, 393 U.S. 175, 178-79 (1968); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 537-38 (1978).

the Court of Appeals suggests, once the implementation of a reorganization plan has begun. 701 F.2d at 609-10, *infra* App. A-29-A-30. As this Court recognized in the *3-R Cases*, constitutional questions get short-surfeit in the collective effort to lay to rest complex railroad reorganizations. 419 U.S. at 145.

B. The Question of the Constitutionality of Sections 7 and 22 is Ripe for Decision.

The Court of Appeals' decision dismissing Petitioners' appeals is based upon an application of the ripeness doctrine which varies significantly from that which this Court used in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967) and, more recently, in *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 51 U.S.L.W. 4449, 4451-52 (U.S. Apr. 20, 1983) (No. 81-1945). It also varies from the conclusions reached in the *3-R Cases*, where this Court reached the merits of a constitutional challenge to the Regional Rail Reorganization Act of 1973, 45 U.S.C. § 701 *et seq.* (1976), in a factural context which is essentially the same as that presented by this Petition. 419 U.S. at 140-47.

The ripeness doctrine comprises an uncertain mixture of prudential and constitutional restraints on a court's willingness to consider otheriwse justiciable controversies. *See Buckley v. Valeo*, 424 U.S. 1, 114 (1976); *3-R Cases*, 419 U.S. 102, 140, 143-45 (1974); *Laird v. Tatum*, 408 U.S. 1, 38-40 (1972) (Brennan, J., dissenting). In *Abbott Laboratories*, this Court stated that the question of ripeness turns on "the fitness of [the] issue for judicial decision" and the hardship to the parties of withholding court consideration. 347 U.S. at 149.

1. The Bankruptcy Clause Question Is Fit For Decision and Passage of Time Will Not Aid Court.

In the *3-R Cases*, the Court conducted a pragmatic analysis of the issue's fitness for decision. That analysis persuaded this Court to reach the merits. The question there, as here, was purely legal and needed little factual development. Indeed, here the challenged provisions have been fully implemented, while in the *3-R Cases* implementation was merely pending. There, as here, the statutory provisions were mandatory in their application against the shareholders of a railroad. There, as here, the substantive right involved was essentially a property right, among the most basic of constitutional rights. There, as here, the uncertainty caused by a refusal to reach the merits was likely to affect the parties in their daily activities. Under such circumstances, review on the merits is required. *3-R Cases*, 419 U.S. at 143; *see also Buckley v. Valeo*, 424 U.S. at 116-17. The possibility of future relief under the Tucker Act did not diminish the ripeness of the questions presented in the *3-R Cases*. For the same reasons set forth there, the possibility of a future Staggers Act conditional forgiveness, or the possibility of future insolvency, ought not affect the ripeness of the Bankruptcy Clause question presented here. *3-R Cases*, 419 U.S. at 142.

The MRRA bears a similarity of purpose to the Regional Rail Reorganization Act of 1973. *Compare* 45 U.S.C. § 901 *and* § 701. Both are congressional attempts to effectuate a railroad reorganization by direct legislation. As in the *3-R Cases*, decisions are being made at this moment by the Trustee, and are to be made shortly by the Trustee, the Interstate Commerce Commission, and the Reorganization Court, which will be influenced by whether the MRRA debt is valid. The future of

this reorganization will be complex and subject to intense pressure for resolution. The potential $104 million MRRA debt is a major element in this process. The complexity of the Trustee's proposals and the relatively brief time involved will render actions taken now virtually irreversible. As Justice Brennan pointed out in the *3-R cases:* "delay in decision will create the serious risk that consideration of the validity of those provisions may either be too hasty to afford protection of rights or too late to . . . assure compensation if the [Acts] were found unconstitutional." 419 U.S. at 145.

The occurrence of future events will not advance this Court's ability to deal with the Bankruptcy Clause question. As in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 81-82 (1978), the prudential considerations of the ripeness doctrine require a decision on the Bankruptcy Clause issue because future events will be of no substantial aid to the Court, because all parties will be adversely affected by further delay, and because there will be no better time for decision.

2. Failure To Decide Merits Is Causing Serious Current Harm To All Parties.

The Court of Appeals' refusal to reach the constitutional question was primarily based upon its conclusion that Petitioners were not suffering any current concrete harm and that future events might foreclose injury altogether. Both conclusions are demonstrably incorrect. The harm which Petitioners are suffering is current, it is concrete, and it is not speculative or hypothetical. The accrual of compound interest at 14.687 percent per annum is a significant financial burden upon the Estate and, thus, upon Petitioners. By December 1984, the

MRRA debt will have almost doubled, by reason of interest alone, to approximately $104 million. Additionally, the role of the MRRA debt in the formulation of the Trustee's plan of reorganization is now clear. It is not, as the Court of Appeals suggests, a mere cloud over negotiation. 701 F.2d at 610, *infra* App. A-30. Rather, it is a fundamental factor in the Trustee's consideration of the alternatives open to the Estate. It will loom even larger as the Interstate Commerce Commission and the Reorganization Court consider the various reorganization alternatives.

The impact of the MRRA debt is reflected in the provisions of the Trustee's Amended Plan. Although the Estate is solvent, the Trustee proposes to cancel all of the Debtor's currently outstanding common and preferred stock and issue new common stock to GTC, to the end that the Debtor will become a wholly-owned, subsidiary of GTC. GTC will gain control of approximately $498.3 million in assets subject to approximately $310.7 million in long and short term liabilities and a projected ability to produce net pre-tax income after the service of debt.[12] The Estate is to receive no direct compensation from GTC. Rather, the Trustee points to the Staggers Act conditional forgiveness as a "benefit" to the Estate which justifies the proposed transaction. Thus, even with the Staggers Act amendment, the MRRA is currently and directly influencing the course of this one reorganization proceeding, and adversely affecting Petitioners' rights, in violation of the Bankruptcy Clause.

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[12] All statements herein regarding the financial condition of the Estate and the effects of the Amended Plan are based upon the financial statements contained in the Trustee's Amended Plan of Reorganization, Appendix I to that plan, and on the Trustee's 1982 Annual Report on Form 10-K.

The occurrence of future events will not completely ameliorate Petitioners' injuries. The Estate is solvent. There does not appear to be any real likelihood that it will become insolvent in the foreseeable future. The occurrence of the Staggers Act conditional forgiveness does not mean that "there will be no injury to the shareholders and they will have no case or controversy to press." 701 F.2d at 609, *infra* App. A-28. Such a forgiveness will not compensate the Estate for the expense incurred by the Estate and Petitioners in opposing the ill-conceived employee-shipper ownership plan, for the lost opportunity costs inflicted by continuing full system operations, for the delays in formulating and presenting a realistic plan of reorganization, or for the costs incident to the reduced flexibility which the pursuit of the Staggers Act conditional forgiveness has imposed upon the Estate. While the exact measure of the economic impact of the MRRA may not be definitely known at this moment, it is clear that there is such an impact and that it is sufficient to meet the requirements of the ripeness doctrine. *See Village of Belle Terre v. Boraas*, 416 U.S. 1, 9-10 (1974).

3. The Court of Appeals Failed to Distinguish Between The Constitutional Challenges Made By Petitioners.

The Court of Appeals failed to distinguish, as this Court did in the *3-R Cases*, between the types of challenges being made. On the one hand, Petitioners challenged the MRRA's validity as a matter of constitutional authority—the Bankruptcy Clause issue. Alternatively, Petitioners advanced a Fifth Amendment "taking" challenge. In its sweeping refusal to reach the merits of either challenge, the Court of Appeals failed to make the close analysis of the nature of the challenges

exemplifed in the *3-R Cases*. There, this Court considered and decided the constitutional questions presented by the "erosion taking" issue and by "the basic 'conveyance taking' issues." *3-R Cases*, 419 U.S. at 123 & 145. The Court refused to consider "the controversy over the proper valuation theory to be applied." *Id.* at 146-47. In this case, the Court of Appeals failed to recognize the distinction which this Court drew between issues involving the limits of congressional power and those merely involving appropriate forms of relief, or compensation, required by an exercise of a congressional power. The *3-R Cases* teaches that fundamental issues regarding the very existence of a challenged congressional power should be reached and decided on the merits in situations such as those presented by this case.

This approach is not unique to the *3-R Cases*. In *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), this Court reached the merits of a Tenth Amendment challenge to the Surface Mining Control and Reclamation Act of 1977 but refused to reach the merits of the Fifth Amendment "taking" challenge. A similar analytic approach was followed, and a similar result reached, in *Hodel v. Indiana*, 452 U.S. 314 (1981) and in *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (with respect to the International Emergency Economic Power Act).

C. Sections 7 and 22 Are Non-uniform Laws On The Subject of Bankruptcy.

The Reorganization Court's decision upholding the constitutionality of Sections 7 and 22 squarely conflicts with this Court's decision in *Gibbons*. *Compare* App. A-6-A-12 *and* 455 U.S. at 469-71. While the Reorganization Court did not

have the benefit of *Gibbons*, it did have before it the *3-R Cases*, where this Court used a practical effect—geographic scope test in determining that the uniformity requirement of the Bankruptcy Clause was met. 419 U.S. at 159-160 (1974). Here, either *Gibbons* or the *3-R Cases* leads to the same conclusion. Those MRRA sections which are applicable only to this Debtor's Estate are laws on the subject of bankruptcy which are not uniform.

One of the principal aims of the MRRA was to cause the reorganization of the Milwaukee Road along the lines Congress thought appropriate. *See* MRRA § 2, 45 U.S.C. § 901(b). The Staggers Rail Act amendment to the MRRA is a further demonstration of this underlying purpose. 45 U.S.C. § 906(e) (Supp. IV 1980), *infra* App. A-2. With Sections 7 and 22, Congress reached into a pending reorganization and mandated specific relief in aid of one reorganization proposal—an employee-shipper ownership scheme. MRRA §§ 7 & 22, 45 U.S.C. §§ 906 & 920 (Supp. IV 1980), *infra* App. A-1-A-3.

The MRRA's nature as such is evident, not only from its effects upon the Milwaukee Road and the Debtor, but also from the events and the legislative history surrounding its passage. *See* H.R. Rep. No. 225, 96th Cong., 1st Sess., *reprinted in* 1979 U.S. Code Cong. & Ad. News 1742. The MRRA was the congressional response to the embargo of 6,900 miles of unreorganizable non-Core lines. It was passed after the Reorganization Court had concluded that continued operations of those lines with priority borrowed funds was improper. 701 F.2d at 606, *infra* App. A-22-A-23. It mandates operations. It imposes additional debt. It re-orders claim priority. It expropriates the Debtor's assets in pursuit of a congressional purpose. By their terms, Sections 7 and 22 apply only to the Milwaukee Road ignoring the several other bankrupted railroads. *Gibbons*,

455 U.S. at 471 n. 11. No other reorganizing or bankrupted railroad is affected by its preference for an employee-shipper ownership based reorganization. No other reorganizing or bankrupted railroad is ordered to maintain full operation while such a reorganization plan is specially considered by the Interstate Commerce Commission and Reorganization Court. No other reorganizing or bankrupted railroad's shareholders are required to bear the burden of the cost of such a congressional experiment. As it uniquely touched only the Milwaukee Road, the MRRA is a classic example of custom tailored legislative bankruptcy relief having application in only one case. Such legislation cannot be sustained. *Id.*, 455 U.S. 457; *In re Sink*, 27 F.2d 361 (W.D. Va. 1928) *appeal dismissed*, 30 F.2d 1019 (4th Cir. 1929).

CONCLUSION

We respectfully urge this Court to issue a writ of certiorari to reverse the decision of the Court below for each of the reasons stated above.

Dated: 16 May 1983

Respectfully submitted,

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APPENDIX

APPENDIX A

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, §8, cl. 4 provides:

> The Congress shall have Power * * * To establish * * * Uniform Laws on the Subject of Bankruptcies throughout the United States;

The Fifth Amendment to the Constitution of the United States provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 7 of the MRRA reads as follows:

> Sec. 7. (a) Subsection (a) of section 3 of the Emergency Rail Services Act of 1970 (45 U.S.C. 662(a)) is amended by striking out "upon a finding" in the fifth sentence and all that follows in that subsection and inserting in lieu thereof a period.
>
> (b) Section 3 of the Emergency Rail Services Act of 1970 (45 U.S.C. 662) is amended by inserting after subsection (b) the following new subsection:
>
> "(c) The Secretary shall not guarantee any certificate under this section unless such certificate is treated as an expense of administration and receives the highest lien on the railroad's property and priority in payment under the Bankruptcy Act, except that this subsection shall not apply to certificates guaranteed for a railroad that is actively engaged in restructing, as defined by the Secretary. For purposes of this subsection, the term "restructing" includes an employee ownership plan or an employee-shipper ownership plan.".
>
> (c) Section 3(e) of the Emergency Rail Services Act of 1970 (45 U.S.C. 662(e)) is amended—
>
> (1) by striking out "$125,000,000" and inserting in lieu thereof $200,000,000; and
>
> (2) by striking out the last sentence thereof, as added by Public Law 96-86.

(d) The Secretary of Transportation shall, under the authority of the Emergency Rail Services Act of 1970, immediately guarantee trustee certificates of the Milwaukee Railroad, on the basis of an estimate of the amount required to be provided under subsection (e) of this section, for purposes of allowing the Milwaukee Railroad, commencing November 1, 1979, to maintain its entire railroad system in accordance with section 22 of this Act, and as required to finance operations which the Milwaukee Railroad continues for the 60-day period beginning on the date of the occurrence of an event described in section 22(b) of this Act or on April 1, 1980, whichever first occurs. Such guarantee shall be made without regard to the findings set forth in section 3(a) of the Emergency Rail Services Act of 1970, and the provisions of section 3(b)(3) and the last two sentences of section 3(d) of such Act shall not apply to such guarantee.

(e) The Secretary shall guarantee trustee certificates of the Milwaukee Railroad pursuant to this section in an amount equal to the difference between (1) the total expenses incurred by such railroad attributable to the maintenance and the continuation of service in accordance with subsection (d) of this section, and (2) the revenues of such railroad.

(f) Notwithstanding the provisions of section 3(c) of the Emergency Rail Services Act of 1970, certificates guaranteed under this Act shall be subordinated to the claims of any creditors of the Milwaukee Railroad as of the date of enactment of this Act.

(g) The Commission shall immediately make available to the Secretary of Transportation the sum of $10,000,000, out of funds available for directed service under title 49 of the United States Code. The Secretary of Transportation shall immediately make such funds available to the trustee of the Milwaukee Railroad for purposes of financing the operations of the Milwaukee Railroad, beginning November 1, 1979, in accordance with section 22 of this Act.

Section 18 of the MRRA reads as follows:

Sec. 18. Until April 1, 1981, the provisions of this Act shall be in lieu of any directed service on any line of the Milwaukee Railroad under section 11125 of title 49 of the United States Code.

Section 22 of the MRRA reads as follows:

Sec. 22. (a) Until the occurrence of an event described in subsection (b) of this section, the Milwaukee Railroad (1) shall maintain its entire railroad system, as it existed on October 15, 1979, (2) shall continue no less than the regular level of service provided by it as of that date, and (3) shall not embargo traffic (other than when necessitated by act of God or safety requirements) or abandon or discontinue service over any part of its railroad system.

(b) The Milwaukee Railroad shall comply with the requirements of subsection (a) of this section until—

(1) an employee or employee-shipper ownership plan is not submitted to the Interstate Commerce Commission within the time period prescribed under section 6(a) of this Act;

(2) the proposed plan is found by the Commission not to be feasible or the Commission does not act within 30 days;

(3) The proposed plan is found by the bankruptcy court not to be fair and equitable to the estate of the Milwaukee Railroad; or

(4) the plan is not implemented within the time period prescribed under section 6(c) of this Act.

Section 701(c)(1) of the Staggers Rail Act of 1980 reads as follows:

(c)(1) Section 7 of the Milwaukee Railroad Restructuring Act (45 U.S.C. 906) is amended by adding at the end thereof the following new subsection:

"(h)(1) All obligations to the United States or any agency or instrumentality of the United States incurred pursuant to this section by the Milwaukee Railroad or the trustee of the property of the Milwaukee Railroad shall be waived and canceled when—

"(A) The Milwaukee Railroad is reorganized as an operating rail carrier; or

"(B) substantially all of the Milwaukee Railroad is purchased.

"(2) For purposes of this subsection, substantially all of the Milwaukee Railroad shall be considered as having been purchased when (A) more than 50 percent of the rail system operated by the Milwaukee Railroad on the date of enactment of the Staggers Rail Act of 1980 has been purchased, and (B) more than 50 percent of the employees employed by the Milwaukee Railroad on such date of enactment have obtained employment with other rail carriers.".

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable Thomas R. McMillen,
Case No. 77 B 8999 Date Nov. 23, 1979
Title of Cause
Brief Statement of Motion.

In the Matter of CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC R. CO.

ORDER NO. 246

Trustee's motion to borrow $30,000,000 as set forth in his application dated Nov. 13, 1979 is granted. In the alternative, his motion to borrow $30,000,000 as set forth in his application dated Oct. 10, 1979 is also granted. (Decision attached)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of
CHICAGO, MILWAUKEE
ST. PAUL AND PACIFIC
RAILROAD COMPANY

Debtor.

In Proceedings For
The Reorganization Of
A Railroad
77 B 8999

DECISION

The Trustee has filed two petitions for authority to issue government guaranted certificates for a loan of $30,000,000. The first petition was filed pursuant to the Emergency Rail Services Act of 1970, and the second one was filed later under that Act as modified by the Milwaukee Railroad Restructuring Act (P. L. 96-101) which was signed into law on Sunday, November 4, 1979. Proper notice was given on the hearing on the first application, and the court allowed that notice to stand for hearing on the second application without further publication.

Hearings were held on November 14 and 15, 1979 before the undersigned Judge and Special Master Milton Gray, but a written report was not requested from the Master because of the Trustee's immediate need for a loan. The following decision is made, however, after consultation with the Special Master and the receipt of a careful memorandum from him on the principal issues involved. We are in substantial agreement on the merits.

The Financial Facts Require The Loan

The evidence in the record and found previously in our Decision of September 27, 1979 leave no doubt that the Milwaukee Railroad is once again in the precarious condition of imminent cashlessness. According to the testimony of the Trustee's vice president-finance, Richard V. Nugent, Jr., at the hearing on November 14, 1979, the railroad expects to operate at a loss of $34,000,000 during November and December 1979 if full service is maintained. It had a book cash balance of $5.8 million on November 1, 1979, a balance which was achieved only by drawing down $6.3 million of the escrowed proceeds of property sales on October 31, 1979. Operations were made possible during the month of November by a

$10,000,000 grant received under P.L. 96-101, but the book cash deficit at the end of November is estimated to be $5,300,000 if the escrow account is reimbursed. The cash drain for December is estimated at $12.3 million. Therefore, without the $30,000,000 loan now being requested, the Trustee would have a deficit cash position of $17.6 million by December 1979. With a loan of $30,000,000 for operating and maintenance expense, the Trustee would end the year with a balance of $12.4 million book cash if the escrow account is repaid. The Trustee concurred in the statement of his financial vice president, and no evidence was offered to the contrary.

The prospects for the early part of 1980 are equally bleak. There can be no doubt that substantial deficit financing will then be needed, but the amount cannot be estimated because of various contingencies written into P.L. 96-101. Under §7(e) of P.L. 96-101, the government will pay for the deficit up to a maximum of 60 days after April 1, 1980. If a plan under P.L. 96-101 is not approved or cannot be implemented, the loans will be needed for transitional and operating expenses well before April 1, 1980. We find that the $30,000,000 of guaranteed trustee's certificates are necessary for any continued operation of the Milwaukee's rail services.

The Constitutional Issues

The unexpected arrival of P.L. 96-101 on the scene drastically changed the focus of the hearing. The bondholders and stockholders objected to the loan under P.L. 96-101 on the grounds that the enabling portions of that statute are unconstitutional. The statute's constitutionality was supported by the Attorney General of the United States, by the Railroad Labor Executives Association, and by the states of Washington and Montana, among others. The Trustee took no position on this issue. Many helpful briefs have been filed on the con-

stitutional issues, all of which have been carefully considered. Since copies of this rather unusual statute are not yet readily available, we are attaching a copy of this Decision.*

We have concluded that §§6, 7, and 22 of P.L. 96-101, to the extent that they implement the Trustee's application to borrow $30,000,000, are not fatally defective and that his petition should be granted. Alternatively, his petition to borrow $30,000,000 under the unmodified E.R.S.A. should also be granted.

The Issue Of Uniformity

The attorney for the stockholders immediately contended that P.L. 96-101 failed to comply with Article I, §8 of the United States Constitution requiring uniformity of bankruptcy laws. Most of the other objectors have joined in his contention. Article I, §8 provides in pertinent part that;

The Congress shall have the Power . . .

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States . . .

This provision has received little scrutiny by the courts or Congress, but whenever it has been involved in litigation, the word "uniform" has been diluted from its facial simplicity. The understanding of the early commentators was that creditors and debtors of a bankrupt estate should be treated uniformly throughout the nation, not that each bankruptcy law would be uniformly applied to all types of bankruptcies. The author of Federalist No. 42 stated that Congress' power to establish uniform laws of bankruptcy "will prevent . . . many frauds where the parties or their property may lie or be

* Some legislative history is published in the Congressional Record (House) of Nov. 2, 1979, and a letter from Senator Max Baucus of Montana (Debtor's Ex. 2) adds to the published history.

removed into different states . . . ." Story's *Commentaries on the Constitution* (1833), §1109, also stated that the power was useful "as a check upon undue state legislation."

Even geographical uniformity is no longer required by Article I, §8. In *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974) the court said at p. 159:

The uniformity provision does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems . . . .

We therefore agree with the Special Court that the uniformity clause was not intended "to hobble Congress by forcing it into nationwide enactments to deal with conditions calling for remedy only in certain regions." *In re Penn Central Transportation Co.*, 384 F.Supp. 895, 915 (Special Ct. 1974).

Congress found in §2 (a)(2) of P.L. 96-101 that "cessation of operations by the Milwaukee Railroad would have serious repercussions on the economies of the states in which such railroad principally operates," naming the states of the Mid-West and Far West. P.L. 96-101 treats stockholders and creditors, as well as the debtor, uniformly throughout the region served by the railroad. The fact that no other railroad happens to be affected by this statute does not prevent it from being uniform within the meaning of Article I, §8. Section 77 itself is a special bankruptcy law.

Special legislation is not necessarily non-uniform, as Justice Frankfurter pointed out in concurring in *Vanston Bondholders Protective Committee* v. *Green*, 329 U.S. 156 at 172 (1946):

The Constitutional requirement of uniformity is a requirement of geographic uniformity. It is wholly satisfied when existing obligations of a debtor are treated alike by the

bankruptcy administrations throughout the country, regardless of the State in which the bankruptcy court sits. See also *Hanover National Bank* v. *Moyses*, 186 U.S. 181, 190 (1902) Thus if P.L. 96-101 is an amendment to the Bankruptcy Act, it is a uniform, constitutional statute for the designated region.

There can be no doubt that P.L. 96-101 amends the Bankruptcy Act by suspension or elimination of some provisions of §77. This does not make §§6, 7, and 22 a "bankruptcy law," subject to the uniformity requirement of the Constitution, however.

Section 6 gives priority to an employee-shipper ownership plan as an alternative to any plan of reorganization. The priority plan (hereinafter referred to as E.S.O.P.) is subject to scrutiny by the Interstate Commerce Commission and the court but is not the equivalent of a bankruptcy reorganization plan. Only if an E.S.O.P. fails do the reorganization plans now on file regain any vitality.

During the E.S.O.P. period, §7 of P.L. 96-101 requires the railroad to maintain its entire system as it existed on October 15, 1979, the government guaranteeing certificates for the deficit between revenues and total expenses attributable to "maintenance and continuation" of full service. These certificates are subordinated to the claims of all creditors but not to stockholders. It is not clear that an E.S.O.P. may properly attempt to realign or reduce debts, but it will at least supersede any plan of reorganization if it is implemented on or before April 1, 1980 as required.

Furthermore, in order for the Interstate Commerce Commission and this court to determine whether or not an E.S.O.P. is "fair and equitable" to the estate, as is required by §6, a comparison must be made with any plans of reorgani-

zation to determine whether the purchase contemplated by an E.S.O.P. is at least as beneficial to the stockholders and creditors of the estate as any other plans which can be proposed. But an E.S.O.P. itself will presumably resemble a purchase plan, replacing the corpus of the estate with cash or the equivalent.

This court and the Seventh Circuit Court of Appeals have previously found that the operation of the railroad in its elongated form will erode the interest of the creditors. For this reason, when the estate became substantially cashless, we authorized an embargo over a major portion of the system in order to minimize erosion and facilitate a §77 reorganization. P.L. 96-101 has alleviated the cashlessness by a grant of $10,000,000 and by a guarantee of trustee's certificates for an indeterminate time and amount. Thus, although the new statute unquestionably amends the reorganization procedure, §§6, 7, and 22 do not replace §77 with another "bankruptcy act."

The statute contains other provisions which amend §77 but which are not involved in the pending application for a loan. For example, abandonment of railroad property is transferred from the Interstate Commerce Commission to the bankruptcy court by §§5 and 17 of the Act, greatly expediting reorganizability. Section 9 provides for "Employee Protection Agreements," the payment of which will be treated as administrative expenses of the estate. Pursuant to §13 of the Act, any employee who accepts such a payment or other benefits under §§10 or 12 of the Act waives any benefits otherwise available under the Bankruptcy Act or 49 U.S.C. §11347. We do not pass on these provisions.

The Due Process Objections

The stockholders and two of the indenture trustees contend that the new statute deprives them of their interest in the railroad without due process. The indenture trustees assert that by requiring the full system to be operated until possibly April 1, 1980 the physical facilities will be depreciated and the bondholders will thereby be deprived of this value without compensation if the railroad is ultimately reorganized or liquidated.

There is no hard evidence to support this contention, however. P.L. 96-101 provides for guaranteed trustee certificates to compensate the railroad for "maintenance" as well as service (§7(e)), and these certificates are subordinated to the bonds. If the physical property of the railroad is not maintained up to its current value because Congress has mandated full service, then presumably the bondholders would have a claim under the Tucker Act (28 U.S.C. §1491) for any loss caused by P.L. 96-101. See *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 148 (1974).

Furthermore, there is no present basis to find that the E.S.O.P. which is due to be filed December 1, 1979 will not compensate the secured creditors as fully as the trustee's reorganization plan, since the railroad is operating its full system to accommodate the proponents of an E.S.O.P. which must be found "fair and equitable" to the estate.

The potential erosion of the stockholders' equity is more serious and less speculative than that of the secured creditors. The stockholders may have an equity of value. The Ford, Bacon and Davis appraisal arrived at a liquidation value of $832,000,000 as of December 31, 1977, and the latest report filed with the I.C.C. shows assets of $823,626,234, and shareholders' equity of $132,302,553 after all liabilities and de-

ferred credits. The Trustee's reorganization plan provides that the preferred stockholders will become the common stockholders, a meaningless gesture if they have no value. We do not find evidence in the record that the stockholders have no property interest or that their interest cannot be eroded in value by the certificates now under consideration.

The trustee's certificates for operation of the entire railroad system, possibly for 60 days after April 1, 1980, are subordinated only to claims of creditors, not to stockholders. After the $10,000,000 grant has been used (which will happen before an E.S.O.P. can be acted upon), the deficit of operating and maintaining the full rail system must be borne by the government. An additional $75,000,000 may accrue as an expense of administration for the employee protection features of the Act, but to the extent claims of furloughed or severed employees can be reduced from their present estimate of a $350,000,000 preferred claim, the stockholders would be benefitted, not prejudiced. Also, if an E.S.O.P. is not implemented, reorganization or liquidation is greatly expedited by §§ 4, 5, 9, and 15 of the Act, *inter alia*.

Thus any substantial erosion of the stockholders' equity is speculative, at least unless an E.S.O.P. is filed on or before December 1, 1979. The legal answer to their complaint, however, is again the availability of the Tucker Act. The Supreme Court has recently made it clear that this remedy remains unless it is withdrawn by the statute upon which the claimants base their claim. *Regional Rail Reorganization Act Cases*, *supra*, p. 5, involved the acquisition of eight eastern railroads to create Conrail and the court stated at 419 U.S. p. 148:

If . . . the consideration exchanged for the rail properties should prove to be less than the constitutional minimum, the Tucker Act will be available as the jurisdictional bases for

suit in the Court of Claims for a cash award to cover any constitutional shortfall.

See also *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, fn. 39 (1978). No party has contended that P.L. 96-101 indicates any intention of Congress to withdraw from the stockholders the Tucker Act's remedy. Indeed, Senator Baucus has affirmed Congress' intent to preserve this remedy (Debtor's Ex. 2).

A due process problem which does concern the court and the Special Master is presented by §6(b) of the Act. This Section requires the court to determine between January 1 and January 10, 1980 whether the E.S.O.P. received from the I.C.C. is "fair and equitable to the estate." This section is apparently intended to produce a *de novo* finding by the court after a "hearing," although the Commission's determination on the issue can be rebutted only by "clear and convincing evidence". The Commission can make its findings on a paper record, but we are completely unable to conceive how any parties who might oppose an E.S.O.P. can be granted a due process hearing on fairness and equity during the ten days after the I.C.C. submits its findings to this court. The Fifth Amendment requires not only a "meaningful" opportunity to be heard but also a fair opportunity for preparation. *Mathews* v. *Eldridge*, 424 U.S. 319 (1976); *Armstrong* v. *Manzo*, 380 U. S. 545 (1965).

The Equal Protection Objections

It is also contended, particularly by the First National Bank as an indenture trustee, that this new statute deprives bondholders of equal protection under the Fifth Amendment to the United States Constitution. It is contended that, by giving priority to an E.S.O.P. acquisition of all or substantially all of the railroad's property, Congress has discrimi-

nated against the creditors by depriving them of a railroad reorganized under §77 of the Bankruptcy Act. Of course, one cannot raise this objection to a statute unless he will be harmed by it. *Poe* v. *Ullman*, 367 U.S. 497 (1961).

We have already adverted to the fact that an E.S.O.P. cannot be evaluated in the abstract under this new statute. It must be found to be "fair and equitable" to the estate. This means to us that it must be at least as favorable to the creditors as any other plan which is brought to the attention of the I.C.C. or the court. Thus the creditors are not being deprived of the economic benefits of a §77 reorganization plan. They are being accorded an alternative which must be substantially as favorable to them as any other plan. Bearing in mind that one attacking the constitutionality of a statute has the burden of showing that the legislature acted in an arbitrary or invidiously discriminatory manner, and that the Congress has the power and duty to adopt public policy, we find and conclude that the indenture trustees and stockholders have failed to sustain their burden. See *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

We also fail to see how the conditions attached to the proposed $30,000,000, or the additional loans which may be needed to carry the railroad up to 60 days after April 1, 1980 deprive any party of equal protection. Section 77 is a creature of Congress which can be taken away, as can directed service. All creditors are treated the same under the new Act. We have found that their interests are not unconstitutionally eroded and that the amendments to the Bankruptcy Act do not conflict with the requirement of uniformity. We know of no constitutional prohibition against preferring one class of persons above others. Since we find a "rational basis" for classifying employees differently from creditors, the equal protec-

tion clause is not violated. *Trafelet* v. *Thompson*, 594 F.2d 623 (7th Cir. 1979), *cert. denied*, —— U.S. ——, 48 U.S.L.W. 3239 (Oct. 9, 1979); *United States* v. *Neary*, 552 F.2d 1184 (7th Cir. 1977), *cert. denied*, 434 U.S. 864 (1977).

Separation Of Powers

Some parties have contended that the enactment of P.L. 96-101 unconstitutionally invades the exclusive prerogative of the judiciary to decide cases under Article III, §1 of the Constitution. For example, the statute requires the railroad to provide full service over the entire system for a period which may extend 60 days beyond April 1, 1980, despite decisions by this court and the Court of Appeals that such an unprofitable operation should not continue. Senator Baucus has stated:

> The Court of Appeals' decision held that §77(c)(3) constituted a grant of statutory discretion empowering the reorganization court to [embargo service outside the Miles City Subcore]. The Milwaukee Railroad Restructuring Act reverses the Seventh Circuit's opinion in this regard. (*Debtor's Ex. 2.*)

Section 18 of the new statutes also prohibits the Interstate Commerce Commission from directing service on any portion of the Milwaukee Road before April 1, 1981 (49 U.S.C. §11125). We had relied upon directed service to some extent in authorizing an embargo. These provisions of the statute therefore do interfere with this court's efforts to protect creditors and to reorganize the railroad. They change the law of the case but do not necessarily deprive this court of its decision-making power prospectively.

The leading case on the Constitutional requirement that the executive branch can not make decisions for the judicial branch is *United States* v. *Klein*, 13 Wall. (80 U.S.) 128

(1872). That case was really an *ex post facto* attempt by Congress to interfere in pending litigation and to control the outcome by adopting a rule of evidence. The effect of the statute was to preclude claimants from recovering property which had been seized or abandoned during the Civil War. The Supreme Court found that this was an attempt by Congress to preempt the power of the judiciary and declared the statute unconstitutional in violation of Article III.

We find and conclude that Congress has the power to amend statutes prospectively and that it may do so with the intent and effect of overcoming judicial decisions, so long as its statute does not violate some other provision of the Constitution. Cf. *Pope* v. *United States*, 323 U.S. 1 (1944). The duty of the judiciary is to uphold the Constitution and laws of the United States, so long as Congress enacts a law which is not shown to be unconstitutional. We cannot be offended by the fact that Congress is changing a decision which was based on a statute which has now been amended.

We have limited the foregoing discussion to those provisions of P.L. 96-101 which are more or less directly involved with the Trustee's petition to borrow $30,000,000 by means of guaranteed certificates. We do not intend to express an opinion on the constitutionality of any provisions of the new act which are not put in issue by his petition. Some provisions of the statute have not yet come into play, may never do so, and are separable from those reviewed herein. *Buckley* v. *Valeo*, 424 U.S. 1, 108-9 (1976). We reserve judgment on any such provision but find and conclude that §§ 6, 7, and 22 of P.L. 96-101 are constitutionally valid.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Trustee's motion to borrow $30,000,000 on the terms set forth in his application to the Secretary of

Transportation dated November 13, 1979 is granted. In the alternative, his motion to borrow $30,000,000 on the terms set forth in his application to the Secretary of Transportation dated October 10, 1979 is also granted.

ENTER:

Thomas R. McMillen

JUDGE, U.S. DISTRICT COURT

DATED: Nov. 23, 1979

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable Thomas R. McMillen,
Case No. 77 B 8999 Date Feb. 25, 1978
Title of Cause
In Re: Chicago, Milwaukee, St. Paul & Pacific Railroad
Enter order No. 246C; that order No. 246 is amended and the Trustee is authorized to borrow up to an additional $30 million in accordance with ERSA. . . . . (DRAFT)

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 79-2444, 80-1425
In Re: CHICAGO, MILWAUKEE, ST. PAUL AND
PACIFIC RAILROAD COMPANY,
Debtor.

Consolidated joint appeals of:
CHICAGO MILWAUKEE CORPORATION, as Shareholder.
PACIFIC RAILROAD COMPANY, as Debtor, and
CHICAGO MILWAUKEE CORPORATION, as Shareholder.

Apeals from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 77 B 8999—Thomas R. McMillen, Judge.

ARGUED DECEMBER 3, 1982—Decided
FEBRUARY 16, 1983

Before WOOD and ESCHBACH, *Circuit Judges*, and SWYGERT, *Senior Circuit Judge*.

SWYGERT, *Senior Circuit Judge*. This appeal represents yet another installment in the saga of the Chicago, Milwaukee, St. Paul and Pacific Railroad's ("Milwaukee Road") reorgani-

zation proceedings.[1] The shareholders seek a declaration that nearly sixty million dollars in certificates of indebtedness held by the Milwaukee Road are invalid. According to the shareholders, these certificates are invalid because they were issued pursuant to a federal statute which violates the constitutional requirement of uniform bankruptcy laws, art. I, §8, cl. 4, and due process, equal protection, and separation-of-power principles. Because important facts will not be known until there are further proceedings below, we dismiss this appeal because the action is not ripe for review.

I

The facts pertinent to the shareholders' claims begin in the spring of 1979 when the Special Master concluded that the entire Milwaukee Road system would never be reorganized as a single system. The Special Master determined that some parts could be reorganized as a viable rail carrier and other segments could be sold for continued rail operation to third parties. In August 1979 the court-appointed Trustee ("Trustee"), aided by the Special Master's report, concluded that a midwestern "core" system consisting of three thousand miles of rail track (approximately one-third of the entire Mil-

[1] The Milwaukee Road filed a petition for reorganization in the United States District Court for the Northern District of Illinois on December 19, 1977, pursuant to section 77 of the Bankruptcy Act, 11 U.S.C. § 205 (1976) (repealed effective 1979). These proceedings continue to be governed by section 77. Pub. L. No. 95-598, § 403, 92 Stat. 2683. This court has previously reviewed other aspects of the reorganization proceedings. *See, e.g., Matter of Chicago, Milwaukee, St. Paul and Pacific Railroad*, 673 F.2d 169 (1982); 658 F.2d 1149, *cert. denied*, ... U.S. . . . . , 102 S.Ct. 1632 (1982); 654 F.2d 1218 (1981); 648 F.2d 1261 (1981); 641 F.2d 482 (1981); 632 F.2d 45 (1980); 624 F.2d 1105 (1980) (Nos. 80-1426, 80-1473, 80-1474) (unpublished order), *aff'g*, 471 F. Supp. 964 (N.D. Ill. 1979), 611 F.2d 662 (1979) (*per curiam*); 585 F.2d 254 (1978).

waukee Road system) could be reorganized into a viable rail carrier. The balance of the Milwaukee Road's tracks was dubbed the "non-core" lines.

In the fall of 1979 the district court ("Reorganization Court") found that the Milwaukee Road was approaching a condition of cashlessness—a condition which exists if a railroad has insufficient funds to pay its employees and suppliers, thus preventing an orderly liquidation. If such funds are not available under terms fair to the estate, the railroad simply cannot operate. *Matter of Chicago, Milwaukee, St. Paul and Pacific Railroad*, 611 F.2d 662, 669 (7th Cir. 1979) (*per curiam*) (*"Embargo Decision"*); *In re Valuation Proceedings*, 439 F. Supp. 1351, 1375-77 (Sp. Ct. 1977). Because of the Milwaukee Road's impending cashlessness, the Reorganization Court, on September 27, 1979, ordered that operations on the Milwaukee Road's non-core lines be embargoed as of November 1, 1979.

The partial embargo order authorized the Trustee to borrow funds to support continued operations on the core lines. On October 10, 1979 the Trustee sought guarantees from the federal government of $30 million in loans, pursuant to the Emergency Rail Services Act of 1970 ("ERSA"), 45 U.S.C. §§ 661 *et seq.*

Here we must present a brief legislative history of the oft-amended ERSA which authorizes the Secretary of Transportation ("Secretary") to issue guarantee of loans necessary for continued operations of railroads. As originally enacted ERSA provided that the Secretary could not guarantee the loans unless he found, *inter alia*, "that the probable value of the assets of the railroad in the event of liquidation provides reasonable protection to the United States." 45 U.S.C. § 662(a)(6) (1976). ERSA also required that repayment of these loans

"must be treated as an expense of administration of the reorganization and receive the highest lien on the railroad's property and priority in payment under the Bankruptcy Act." 45 U.S.C. § 662(c) (1976). The high priority requirement, section 662(c), was repealed as part of the Bankruptcy Act of 1978. Pub. L. 95-598, Title III, § 333, Nov. 6, 1978, 92 Stat. 2679, 45 U.S.C. § 662 (Supp. II 1978). The repeal "permit[s] the United States to finance an insolvent railroad on less than a first lien position. [It] is not intended to mean that the U.S. Government should bail out insolvent railroads. Rather, in the event the Secretary desires to finance an insolvent railroad in a case in which a first lien would be disasterous [sic] to efforts to reorganize the railroad, the Secretary is given discretion to accommodate the public interest." Statements by the Hon. Don Edwards, Chairman of the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, and the Hon. Deccis DeConcini, Chairman of the Subcommittee on Improvements in Federal Machinery of the Senate Committee on the Judiciary, upon introducing the [final version of the Bankruptcy Act of 1978], 124 Cong. Rec. 32411, 34011 [1978], *reprinted in* 1978 U.S. Code Cong. & Ad. News 6486, 6555-56. A month later, on November 8, 1978, Congress further eased ERSA restrictions by permitting the Secretary to waive the finding that the probable value of the assets would provide reasonable assurance of repayment. Pub. L. 95-611 §3(b), 92 Stat. 3089, 45 U.S.C. §662 (Supp. II 1978).

This was how the law stood on October 10, 1979 when the Trustee sought ERSA guarantees for loans for core lines' operations after November 1. It is unclear from this record whether the Secretary would have issued these ERSA guarantees at a priority below a first lien. It is reasonably clear, how-

ever, that the ERSA guarantees (for core lines' operations) would have had a priority senior to the shareholders' interests.

One consequence of the partial embargo was that it prematurely curtailed the opportunity of two bidders (an association of Milwaukee Road employees and a coalition of employees, shippers, and states) for the railroad's non-core assets. Once a portion of the Milwaukee Road was embargoed, it could not be revived. The embargo meant, therefore, that there was insufficient time for completion of the lengthy Interstate Commerce Commission ("ICC") proceedings considering the bidders' proposals.

On October 12, 1979 the President approved H.J. Res. 412, Pub. L. No. 96-86, 93 Stat. 656 (1979), which required the Secretary to provide ERSA funds to support the operations of both the core and non-core lines. Section 115(a) permitted the Secretary to waive many of the ERSA restrictions and to issue certificates "with such priority in payment as the Secretary deems appropriate to secure repayment[.]" The Trustee immediately commenced negotiations with the Secretary concerning the priority of the debt necessary to operate the entire railroad. The Secretary, however, refused to issue the guarantees unless they had a priority senior to the interests of secured and unsecured creditors because in his judgment a lower priority would not assure repayment. On October 26, 1979 the Reorganization Court concluded that guarantees at this high priority would injure the interests of the creditors and, therefore, could not be authorized.

The Reorganization Court's order specifically discussed what congressional action would permit authorization of loans to operate the non-core lines. The court indicated that such debt must be subordinate to the interests of secured and unsecured creditors. Unpublished Order No. 220E at 2 (Oct. 26, 1979). Additionally, the court expressed its concern for the

shareholders' interests, indicating that government grants were more appropriate than federally-guaranteed loans. *Id.* at 5. The embargo of the non-core lines began on November 1, 1979.

Responding directly to the crisis of the embargo, to the premature curtailment of the two bidders' opportunity to acquire the non-core lines (a possibility seemingly beneficial to the Milwaukee Road estate), and to the Reorganization Court's concerns for the creditors and shareholders, Congress enacted the Milwaukee Road Restructuring Act ("MRRA"), 45 U.S.C. §§ 901-22 (Supp. IV 1980), on November 4, 1979. MRRA, *inter alia:*

(1) required the Trustee to maintain service on the core and non-core lines as it existed on October 15, 1979 until certain events occurred, § 920(a).

(2) required the Secretary to provide a ten million dollar grant to the Trustee for the purpose of financing operations on the Milwaukee Road, § 906(d);

(3) required the Secretary to guarantee certificates pursuant to ERSA to cover the Milwaukee Road's expenses in excess of revenue incurred during the MRRA-mandated period of service, §§ 906(a), (b);

(4) provided that ERSA-guaranteed certificates be subordinate to the claims of all creditors of the Milwaukee Road, § 906(c);

(5) provided for expedited ICC consideration of employee or employer-shipper ownership plans, § 905;

(6) provided the Trustee with a less costly means of settling the potential liabilities associated with traditional labor protection benefits for employees terminated as a result of restructuring or reductions in service, § 908;

(7) allowed the Trustee to more quickly convert unneeded assets to cash which could be invested at high rates of return, §§ 903, 904.

To summarize, in return for continued service on the non-core lines, the Milwaukee Road estate and the shareholders received at least the following benefits. First, debt related to *both* the operations of the core and non-core lines was subordinated to the interests of secured and unsecured creditors. Second, the estate received a ten million dollar grant. Third, the estate received a substantial reduction in its labor protection liabilities. *See Matter of Chicago, Milwaukee, St. Paul & Pacific Railroad,* 658 F.2d 1149, 1157-60 (7th Cir. 1981), *cert. denied,* —— U.S. ——, 102 S.Ct. 1632 (1982) (MRRA legislative history indicates that the Act was designed to provide affordable method of employee protection which would not totally erode assets of estate. 658 F.2d at 1158); *Embargo Decision, supra,* 611 F.2d at 665 (labor protection claims might amount to hundreds of millions of dollars). Fourth, the estate could liquidate assets much more quickly than under prior law, and the estate received expedited ICC consideration of restructing proposals. *See Matter of Chicago, Milwaukee, St. Paul and Pacific Railroad Company,* 641 F.2d 482, 487 (7th Cir. 1981).

Following passage of the MRRA the Milwaukee Road's non-core lines operated from November 4, 1979 through March 1, 1980. Operations continue on the core lines. No bidder received ICC approval for acquisition of the non-core lines, and MRRA low priority funds were no longer available.

Finally, on October 14, 1980, Congress amended the MRRA. Section 701(c)(1) of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1961, 45 U.S.C. §906(e) (Supp. IV 1980), provides that the MRRA-related indebtedness associated with

the core and non-core lines service will be forgiven if the Milwaukee Road is reorganized as an operating rail carrier, or if substantially all of its rail assets are purchased as operating properties.[2] Thus the estate received the potential benefit of complete forgiveness of debt related to the operation of the core and non-core lines during the MRRA-mandated period.

Two additional facts are important. Neither MRRA-related certificates' principal nor interest is payable until the assets of the Milwaukee Road are distributed under an approved plan of reorganization. The Trustee is currently negotiating a reorganization plan which would satisfy the Staggers Rail Act forgiveness provisions.

II

The shareholders and the Trustee have not discussed in any detail the propriety of the relief sought by the shareholders.

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[2] Section 701(c)(1) of the Staggers Rail Act of 1980 provides in pertinent part:

> Section 7 of the Milwaukee Railroad Restructuring Act (45 U.S.C. § 906) is amended by adding at the end thereof the following new subsection:
>
> (h)(1) All obligations to the United States or any agency or instrumentality of the United States incurred pursuant to this section by the Milwaukee Railroad or the trustee of the property of the Milwaukee Railroad shall be waived and canceled when—
>
> (A) The Milwaukee Railroad is reorganized as an operating rail carrier; or
>
> (B) substantially all of the Milwaukee Railroad is purchased.
>
> (2) For purposes of this subsection, substantially all of the Milwaukee Railroad shall be considered as having been purchased when (A) more than 50 percent of the rail system operated by the Milwaukee Railroad on the date of enactment of the Staggers Rail Act of 1980 [October 14, 1980] has been purchased, and (B) more than 50 percent of the employees employed by the Milwaukee Railroad on such date of enactment have obtained employment with other rail carriers.

The United States does address this question, albeit with insufficient analysis. This omission, as the following discussion indicates, cannot be ignored. Because we hold that this appeal is not ripe we do not decide to what relief the shareholders would be entitled if they ultimately prevail. Nevertheless, because the parties seem totally unaware of the ramifications of this issue and because the MRRA is unique, we take this opportunity to discuss our concerns.

The shareholders ask this court to "declar[e] that the trustee's certificates of indebtedness issued pursuant to Section 7 of the MRRA are null and void and direc[t] their cancellation." The shareholders, of course, do not maintain that the other provisions of the MRRA, provisions which benefitted the shareholders, are invalid. In effect they seek a severance of section 7 from the MRRA.

A well-settled principle of constitutional law and statutory construction is that

> the unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

Champlin Refining Co. v. Corporation Commission of Oklahoma, 286 U.S. 210, 234 (1932) (citations omitted). *See United States v. Jackson*, 390 U.S. 570, 585 (1968). *See also Scheinberg* v. *Smith*, 659 F.2d 476, *rehearing denied*, 667 F.2d 93 (5th Cir. 1981) ("The controlling inquiry in matters of severance is whether the legislature intended the offensive statutory provision to be an integral part of the statutory enactment. . . . [t]he question is whether the legislature would have enacted the valid portions of the statute with the un-

constitutional portions stricken therefrom." 659 F.2d at 481 (citations omitted).).

Our review of the legislative history and statutory language of the MRRA indicates that it is not possible to sever section 7 of the MRRA and conclude that Congress would have enacted the remaining provisions. The MRRA can only be viewed as a *quid pro quo* in which, in exchange for continued operations of the non-core lines for a four-month period, Congress gave the estate and the shareholders benefits to which they were not otherwise entitled. Our conclusion is buttressed by the fact that the relief the shareholders seek would result in a substantial and unforeseen windfall to the shareholders at the taxpayers' expense.

If our view of the legislation is correct, the proper relief would be the restoration of the estate to the position it would occupy if the MRRA had not been passed. This position would reflect the ERSA-guaranteed loans (presumably at a higher priority) for operation of the core lines from November 4, 1979 to March 1, 1980, less the $10 million grant, and less the benefits of increased asset liquidity, reduced labor protection liability, and waiver of the entire MRRA-related debt for the core lines during the relevant period if the Staggers Rail Act forgiveness provisions apply.[3] The record does not contain sufficient information to hazard a guess about this position. It is clear, however, that the injury to the shareholders caused by the passage of the MRRA is considerably less than $60 million.

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[3] The United States argues that *all* of the MRRA debt, whether related to core or non-core operations, should be converted to high-priority ERSA loans, and the $10 million grant should be "returned" to the federal government in the event the shareholders prevail. The shareholders completely ignored this argument.

III

In deciding that this appeal is not ripe we follow the Supreme Court's reasoning in *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974) ("*3-R*"). There the Court reviewed the ripeness of each of the challenges to a federal statute which, like the statute at issue here, concerned railroad reorganization proceedings.

Noting that "ripeness is peculiarly a question of timing," 419 U.S. at 140, the Court found that any delay in determining some of the challenges to the constitutionality of the statute would frustrate the very purpose of the statute. *Id.* at 140, n.25. There are no such concerns raised by this appeal. The MRRA's purpose to maintain rail service on the non-core lines while the ICC considered third-party proposals has already been served.

One of the challenges in *3-R* found ripe for review concerned an event which was virtually certain. The *3-R* appellants argued that the provision requiring a conveyance of private rail properties to Conrail violated the due process clause of the fifth amendment. The conveyance was "in no way hypothetical or speculative." *Id.* at 143.

Here, however, the shareholders' claims are speculative and hypothetical. The shareholders are not currently suffering any concrete harm because neither the principal nor interest is being paid. There is a possibility that there will be insufficient assets remaining in the estate to satisfy the Milwaukee Road's creditors with priority senior to MRRA-related claims. There is, moreover, an excellent possibility that the entire MRRA-related debt will be forgiven as a result of the Staggers Rail Act. If either of these events occur, there will be no injury to the shareholders and they will have no case or controversy to press.

The *3-R* Court declined to review a fifth amendment challenge to the statute's valuation method because

> [w]ithout evidence of actual figures . . . , a court is not able to discern 'what legal issues it is deciding,' 'what effect its decision will have on the adversaries, [or] some useful purpose to be achieved in deciding them.' *Public Service Commission v. Wycoff Co.*, 344 U.S. 237, 244 (1952). Clearly the record on these issues does not yet provide the 'confining circumstances of particular situations,' *Communist Party v. SACB*, [367 U.S. 1] at 72 [(1961)], which best inform constitutional adjudication.

419 U.S. at 146. *See also ElPaso Building & Construction Trades Council v. ElPaso Associated General Contractors*, 376 F.2d 797, 800 (5th Cir. 1967); *Danville Tobacco Association v. Freeman*, 351 F.2d 832, 833-34 (D.C. Cir. 1965); *Cha-Toine Hotel Apartment Building Corp. v. Shogren*, 204 F.2d 257, 258-59 (7th Cir. 1953). As discussed in Part II, *supra*, the record concerning the harm to the shareholders is inadequate. We cannot determine what effect a decision would have on the adversaries. Additionally, the actual magnitude of the alleged taking is relevant to our consideration of the shareholders' due process claim. *See Embargo Decision, supra*, 611 F.2d at 666-67 (railroad's due process claim requires a balancing of interests).

In declining to decide the valuation claim, the *3-R* Court noted that "there will be ample opportunity to litigate [the] controversies after the factual record has matured." 419 U.S. at 147. Here, too, there will be ample opportunity to challenge the MRRA once a reorganization plan has been approved and the factual record indicates precisely what, if any, harm the shareholders suffered as a result of the MRRA. We have little

doubt that the shareholders will avail themselves of the opportunity.

The shareholders maintain that they are suffering a current harm because the MRRA-related certificates "cloud" the Trustee's reorganization effort. They offer no evidence that this is true, and the Trustee does not join them in this contention. Rail track assets are peculiarly illiquid. It is logical, therefore, that the estate—and the shareholders—would receive a greater benefit, even without the Staggers Rail Act forgiveness provision, in the reorganization and/or sale of the Milwaukee Road's assets for ongoing rail service. This assumption may not be correct. Certainly the shareholders may martial proof that but for the MRRA a reorganization plan more beneficial to the shareholders would have been negotiated.

As Justice Frankfurter observed:

> Justiciability is of course not a legal concept with a fixed content of susceptible of scientific verification. Its utilization is the resultant of many subtle pressures, including the appropriatness of the issues for decision . . . and the actual hardship to the litigants of denying them the relief sought.

Poe v. Ullman, 367 U.S. 497, 508-09 (1961) (opinion of Frankfurter, J.). Our analysis indicates that the issues on appeal are currently unsuitable for judicial review. Future events may well render the shareholders' claims moot. Balanced against these factors is the shareholders' unsubstantiated claim that the negotiations are hampered by the cloud of the $60 million certificates. As discussed in Part II, *supra*, this cloud is probably considerably less than $60 million. Absent some showing other than these unsubstantiated assertions, we find that the alleged hardship to the shareholders does not

outweigh the inappropriatness of deciding important constitutional questions on such an incomplete factual record.

The appeal is dismissed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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Opinion by Judge Swygert

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

February 16, 1983.

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. JESSE E. ESCHBACH, Circuit Judge

Hon. LUTHER M. SWYGERT, Senior Circuit Judge

Nos. 79-2444 and 80-1425

IN THE MATTER OF:

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, Debtor.

APPEALS OF:

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, Debtor and CHICAGO MILWAUKEE CORPORATION, a corporation, principal stockholder.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 77-B-8999

Judge Thomas R. McMillen

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that this appeal be, and the same is hereby, DISMISSED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX E

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
March 4, 1983
Before
Hon. LUTHER M. SWYGERT, Senior Circuit Judge

IN THE MATTER OF:
CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, Debtor.

Nos. 79-2444 and 80-1425

APPEAL OF:
CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY AND CHICAGO MILWAUKEE CORPORATION

Appeals from the United States District Court for the Northern District of Illinois Eastern Division.

77 B 8999
Judge Thomas R. McMillen

On consideration of the "MOTION TO FILE PETITION FOR REHEARING INSTANTER" filed herein on March 3, 1983, by counsel for the appellants,

IT IS ORDERED that said motion is hereby GRANTED and the clerk of this court is hereby directed to file herein instanter the 25 tendered copies of appellants' "Petition for Rehearing En Banc."

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

April 21, 1983
Before
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. LUTHER M. SWYGERT, Senior Circuit Judge

IN THE MATTER OF:
CHICAGO, MILWAUKEE, ST. PAUL AND
PACIFIC RAILROAD, Debtor.

Nos. 79-2444, 80-1425

APPEALS OF:
CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC
RAILROAD COMPANY, Debtor; and CHICAGO
MILWAUKEE CORPORATION, principal stockholder.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 79-B-8444
Thomas R. McMillen, Judge.

ORDER

On consideration of the petition for rehearing en banc filed in the above matter, no active member of the court has requested a vote on the en banc rehearing,* and all members of the panel have voted to deny said petition,

IT IS ORDERED that said petition for rehearing be, and the same is hereby DENIED.

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* Chief Judge Cummings and Circuit Judge Cudahy did not participate in any consideration of the petition for rehearing en banc.

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